# Summary of Senior ELS Workshop
# (16 May 2002)

1. Compliance Topics

a. **New DA Pam 200-1 (MAJ Liz Arnold)** – The new DA Pam 200-1, para 15-7 outlines key reporting/coordination requirements for environmental enforcement actions. Specifically, the ELS should –

(1) Determine validity of allegations;
(2) Identify disputed facts and defenses (if any);
(3) Preserve the installation's right to a hearing;
(4) Get a realistic compliance plan; and
  (a) If a fine is involved – review penalty calculations,
  (b) compare fine with regulator's policy and identify economic business/size of business penalty criteria (if any),
  (c) identify possible SEPs,
  (d) negotiate lowest possible fine,
  (e) keep the MACOM/ELD in the loop during settlement talks, and
  (f) all environmental agreements must be coordinated with ELD prior to signature.

Note – ELD is updating the **Criminal/Civil Liability Handbook** and hopes to have it out later this Summer.

b. **CAA Sovereign Immunity Update (LTC Charles Green)** - DOJ has determined that we can pay State CAA fines except in the 11th Circuit (i.e., Florida, Alabama, and Georgia) provided (1) the settlement agreement includes a statement that the payment does not constitute a waiver of sovereign immunity and (2) the settlement agreement is approved by ELD/DOJ. This should allow us to avoid the extended disputes that we previously experienced with State CAA fines.

c. **Fort Wainwright Update (LTC Jackie Little)** – On 30 April 2002, EPA's Chief ALJ issued a decision on the Fort Wainwright "business penalties" case. The ALJ concluded that economic benefit (EB) and size of business (SOB) may be taken into account in adjusting civil penalties in federal facility enforcement cases. The ALJ supported this decision by redefining EB to include: Non-monetary benefits, funds that do not generate income, and increased "budgetary flexibility". The Army is appealing this decision to EPA Environmental Appeal Board (EAB).

d. **Water Issues Update (LTC Jackie Little)** - The following CWA developments were discussed:

- **Arsenic Rule** – the final rule lowers the MCL for arsenic in drinking water from 50 to 10 parts per million and requires compliance by 23 Jan 06. This rule will impact several Army water systems.
- **Revised National Wide 404 Permits (NWP)** – the revised NWP requires a permit if there will be a loss of _ acre or less of wetlands, loss of 300 linear feet or less of streambed, and notification to District Engineer if loss of greater than 1/10-acre of wetland (See NWP #39: Residential, Commercial, and Institutional Developments).
- **SWANCC Sequel** – Last year, the Supreme Court held that the COE lacks regulatory jurisdiction over "isolated, non-navigable" waters based solely on the presence of migratory birds. Several environmental groups are drafting legislation to "reinstate federal control" in these cases but Congress is not likely to take up CWA legislation this session.
- **Pesticide/Herbicide Application** – An appeals court held that a NPDES permit is required before applying an aquatic herbicide to an irrigation canal that was a "water of the U.S.". Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001).

2. Restoration/Natural Resource Topic

a. **Langley Air Force Base LUC Dispute (Kate Barfield)** – The Air Force and EPA are intensively debating how land use controls will be enforced at NPL sites. The latest Air Force proposal involves stipulated penalties for certain LUC oversight activities (e.g., annual reports). There are varying degrees of support/non-support for this proposal from the other Services. At this point, it is not clear if the Langley LUC dispute will be resolved and, if so, to what extent it will apply to other military installations.

b. **LUC Implementation (Stan Citron)** – The issue of institutional control (IC) implementation is a growing concern at active and transferring installations. The below table summarizes various IC implementation strategies that are being considered at AMC installations:

| Active Installations | Transferring Installations |
|---|---|
| No deed restrictions | Deed restrictions |
| Deed notices – maybe | Deed notices |
| Installation Master Plans<br>· GIS Map<br>· Site Approval Process<br>· Excavation permits (if applicable) | Zoning<br>· Industrial zoning<br>· Well Field Program<br>· Building permits/Miss Utility Program |
| Notices – publicize ICs in post newspaper, etc. | Notices – provide annual IC notice to LRA. |
| Employee Training – potentially | Self-certification – generally not |

| | |
|---|---|
| very useful | accepted by transferees |
| Fences/Warning Signs | Fences/Warning Signs |
| Monitoring –<br>· Incorporate monitoring into IRP<br>· Report land use changes and significant violations | Monitoring –<br>· Incorporate into gw remediation program<br>· Report significant IC violations |
| Annual Inspections –<br>· Inspection should not unduly burdensome<br>· Scope – Are IC mechanisms working? Any IC violations? | Annual Inspections –<br>· Promote IC awareness by continued oversight<br>· Army may delegate inspection responsibility. |
| Five Year Review | Five Year Review |

3. Litigation Update

a. **Litigation Reports (COL Craig Teller)** – The Army ELD Litigation Division is likely to request more litigation reports in the future. The litigation report provides the starting point for defending cases and bringing claims on behalf of the government. In addition, it provides the installation an opportunity to advocate its view to DA/DOJ. A detailed description of litigation report requirements is set forth in AR 27-40, Chapter 3.

b. **SIAD OB/OD Lawsuit (COL Craig Teller)** – An environmental group challenged SIAD's open burning/open detonation (OB/OD) operations based on alleged violations of various environmental laws (e.g., RCRA, NEPA, ESA, and CAA). The case was settled after the Operations Support Command (OSC) agreed to limit SIAD OB/OD to emergency operations and OB/OD for national security reasons. The lawsuit had the following lessons:

- NEPA Ongoing Activities – The general rule is that NEPA is not required for the continued operation of a facility. However, DOJ was concerned that the 1995 expansion of SIAD OB/OD operations was a major federal action which triggered additional NEPA analysis.
- NEPA Functional Equivalence Doctrine – The functional equivalence doctrine recognizes issuance of RCRA permits by EPA as a functional equivalent of NEPA. During the SIAD OB/OD RCRA permitting process, an analysis was conducted under the State NEPA law. However, DOJ will not advocate extending the functional equivalent doctrine to other agencies for policy reasons.
- Importance of Local CAA Regulations – The county air pollution regulations incorporated language that could be interpreted to limit OB/OD to situations where there is no safe alternate method of disposal. This created another avenue for challenging SIAD OB/OD operations.
- RCRA No Safe Alternate Requirement – The RCRA interim status regulations allow OB/OD of waste explosives "which cannot safely be disposed of through other

modes of treatment". This raises significant questions regarding to what extent OB/OD will be limited due to the advent of safe alternatives to OB/OD.

c. **Fort Richardson Litigation (LTC Tim Connelly)** – A lawsuit involving Fort Richardson has raised the following issues: (1) Does military training indirect fire into waters of the US require a NPDES permit?, (2) Is UXO a CERCLA hazardous substances?, and (3) Is UXO a RCRA solid waste subject to abatement as an imminent and substantial endangerment. On the first issue, the Army filed a NPDES permit application for the Fort Richardson training range operations. The Army intends to litigate the CERCLA and RCRA allegations.

d. **Fort Huachuca ESA Decision (CPT Chin Zen Plotner)** – The Army is appealing a federal district court decision that a USFWS no jeopardy biological opinion was arbitrary and capricious and that the Army violated its duty to ensure that ongoing military activities do not cause jeopardy to endangered species.

4. AEC Topics

a. **"Presidential Regulations" Update (Colleen Rathbun)** – The decision to seek a NPDES permit for Fort Richardson training range operations may have significant ramifications since 80% of the Army ranges have navigable waters or are connected to navigable waters. Under the CWA Section 1323a, the President may issue regulations exempting from CWA requirements "any weaponry, equipment, . . or other classes or categories of property, . . . owned or operated by the Armed Forces and which are uniquely military in nature" if it is in the paramount interest of the U.S. The AEC is working on a proposal for development of regulations implementing this exemption.

b. **The Migratory Bird Treaty Act: *Waking a Sleeping Giant!?* (Scott Farley)** – A federal court recently held that Navy bombing operations on a remote Pacific island violated the Migratory Bird Act and issued a preliminary injunction enjoining all live fire operations. Center for Biological Diversity v. Pirie, Civ. No. 00-3044 (EGS) (D.D.C. 2002). This decision raises questions about the need to obtain a permit for training (e.g., operating tanks, firing into impact areas, etc.) and land management (prescribed burns, timber harvests, etc.) operations which may result in an unintentional taking of migratory birds.

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